2014 IL App (1st) 130141-U

FOURTH DIVISION
December 11, 2014

No. 1-13-0141

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 9528
	)	
EUGENIA POWELL,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not rely on a clear misapprehension of the evidence where it made a reasonable inference from witness's testimony.

¶ 2 Following a bench trial, defendant Eugenia Powell was convicted of aggravated fleeing or attempting to elude a peace officer and sentenced to 24 months' probation. On appeal, defendant contends that she was denied a fair trial because the trial court relied on a mistaken recollection of witness testimony while judging credibility. We affirm.

¶ 3 Defendant was charged by indictment with aggravated fleeing or attempting to elude a peace officer. The charge arose from a traffic stop in Chicago on May 22, 2011. After witnessing defendant fail to stop at a stop sign, police officers chased defendant's vehicle for multiple blocks and observed several more traffic violations before she stopped her vehicle.

¶ 4 At trial, Chicago police officer Robert Cranston testified that he was on patrol on the evening of May 22, 2011, along with his partner, Officer Dave Dimoff. The officers were in a marked police SUV, driving north on Loomis Street. As they approached a four-way stop at 61st Street, they observed defendant's white Hyundai driving in the opposite direction. Defendant proceeded through the intersection without stopping, causing another car to veer slightly out of the way. The officers executed a three-point turn, turned on their siren and flashing blue lights, and followed after defendant. Defendant sped southbound on Loomis Street, passing through several intersections without slowing. The officers observed defendant proceed through several stop signs and red traffic signals without stopping. Initially, defendant pulled two blocks ahead of the police car, but eventually the officers came within a block of defendant. Due to difficulty with the radio, Cranston did not radio dispatch until the officers reached 69th Street.

¶ 5 When the defendant reached 70th Street, she turned left and traveled east down the street. Upon reaching Elizabeth Street, defendant turned left again, followed by another left on 69th Street. Defendant immediately turned into an alley and drove back towards 70th Street. After reaching 70th Street, she turned back onto Elizabeth Street. Defendant then stopped her vehicle halfway down the block.

¶ 6 Both officers approached defendant's stopped vehicle. Defendant began to raise the vehicle's window on Officer Dimoff's arm. Cranston then opened the driver-side door and

attempted to pull defendant from the vehicle. Defendant swung her fist at both officers and yelled obscenities at them. The officers forced defendant to the ground and handcuffed her. Cranston testified that defendant and the inside of her vehicle smelled strongly of alcohol. Once defendant was secured inside the police vehicle, Cranston searched the Hyundai and found an open cup in the front cup holder containing a liquid that smelled strongly of alcohol. Cranston then issued defendant numerous traffic tickets. Another officer, E.K. Haynie, arrived on the scene. There was no one else in defendant's vehicle and no other people on the street at the time of the stop.

¶ 7 Cranston did not mention the veering car, the drive through the alley, or the cup of alcohol in his police report. He did, however, issue several tickets to defendant including one for using an alley as a through street and another for an open alcohol container in a vehicle. He also testified that his report misstated that one of the intersections defendant traveled through had a stop sign where it in fact had a stop light.

¶ 8 Officer Haynie testified that he was on duty May 22, 2011, monitoring radio traffic. While monitoring the radio traffic, Haynie responded to a call to 6905 South Elizabeth where defendant was stopped.

¶ 9 Defendant presented two witnesses: Melineice Reed and Tayshma Wright, defendant's sister. Reed testified that she was standing on Elizabeth Street with a friend at the time of the stop, 10 feet away from defendant's vehicle. Reed watched defendant turn onto Elizabeth Street followed closely by the police vehicle. The police vehicle did not have its lights or siren on until after defendant completed the turn. She then promptly stopped the car. The officers approached defendant's Hyundai with guns drawn.

¶ 10 Wright testified that she was on the corner of 70th Street and Elizabeth Street when defendant turned onto Elizabeth Street, and then walked down the block to within 10 feet of her sister's vehicle once it stopped. She testified that the police vehicle did not even have headlights on. Her testimony was otherwise consistent with Reed's.

¶ 11 Following arguments, the trial court mentioned Officer Haynie's testimony three times before making its findings. The court first stated that the officers stopped defendant "at 6905 South Elizabeth, according to Officer Haynie. That's where he responded to. That was consistent with what Officer Cranston testified to." Later, the trial court stated:

> "Officer Haynie testified. And I found this important in considering the evaluation of the testimony – he said that he reached the address of the 6900 block of South Elizabeth based upon the radio traffic that he heard regarding Cranston and his partner in following the vehicle. That's consistent with Cranston's testimony that he was the radioman and did communicate with the dispatch center regarding what was going on."

Finally, the court stated:

> "Considering the testimony of [Cranston] that the lights and sirens were on not only to have her pull over, but as the officer said, to let other traffic know that they were there for their own safety and coupled with the fact that he that this – this pursuit was put over – what was reported in and Haynie's testimony that he knew to go to 6905 South Elizabeth based upon the radio traffic, seems to me to suggest that the officers had their lights and sirens on during the entire period of

> time. And therefore I doubt the testimony of Miss Reed and Miss Wright regarding that particular fact. It doesn't make sense."

The trial court then found defendant guilty of aggravated fleeing or attempting to elude a peace officer and sentenced her to 24 months' probation. Defendant now appeals.

¶ 12 Defendant contends that she was denied a fair trial because the trial court relied on a mistaken recollection of Officer Haynie's testimony in deciding whether Officer Cranston or defendant's witnesses were more credible. Defendant argues that the court inaccurately stated that Haynie heard radio traffic regarding Cranston's pursuit, misremembering Haynie's actual testimony where he makes no mention of Cranston or the pursuit.

¶ 13 The State argues that defendant forfeited this issue by failing to object at trial and failing to include the issue in her motion for a new trial. The State further contends that while the "*Sprinkle* doctrine" allows relaxation of the forfeiture bar in cases where a judge's conduct is at issue, the doctrine is inapplicable to defendant's bench trial. See *People v. Sprinkle*, 27 Ill. 2d 398 (1963). In arguing against forfeiture, defendant relies upon *People v. Mitchell*, 152 Ill. 2d 274 (1992) and *People v. Williams*, 2013 IL App (1st) 111116.

¶ 14 Typically, the preservation of an error requires a contemporaneous objection and a written post-trial motion raising the issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). When an error involves judicial conduct, a defendant need not object to something "that he had just argued to the court." *Mitchell*, 152 Ill. 2d at 324. During a suppression hearing argument, the *Mitchell* defendant specifically mentioned testimony that the police prohibited him from returning to his home. *Id*. The trial court ruled against defendant, stating that there had been no testimony as to the defendant not being allowed to leave. *Id.* at 307. The Illinois Supreme Court held that the

defendant had not waived his objection, as he had just argued the issue to the trial court. *Id.* at 324. Similarly, in *People v. Williams*, where the defendant argued in closing that a witness made a statement, but the trial court then directly contradicted the defendant, the failure to object was excused. See *Williams*, 2013 IL App (1st) 111116, ¶ 107.

¶ 15 Defendant argues that her failure to raise the issue below should be similarly excused. Defendant argues that credibility was the crux of her arguments, she did not mention Haynie's testimony, and the trial court then misrecalled Haynie's testimony in its findings. Unlike in *Mitchell* and *Williams*, the trial court's statements did not specifically contradict defendant's argument. Defendant did not mention Officer Haynie at all, and while she argued that Cranston had been impeached, she did not argue he was uncorroborated. Thus, there is no direct contradiction between defendant's argument and the court's statements. Therefore, defendant had not just argued the issue to the court and her failure to object has forfeited the issue on appeal.

¶ 16 Under the plain-error doctrine, a reviewing court may still consider a forfeited issue when a clear and obvious error occurred and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant, or (2) the error was so serious it affected the integrity of the judicial process. *People v. Piatowski*, 255 Ill. 2d 551, 565 (2007). Defendant bears the burden of persuasion in proving both that a clear an obvious error occurred and that the error was prejudicial. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The first step in plain-error analysis is to determine whether an error occurred. *Piatowski*, 255 Ill. 2d at 187.

¶ 17 During a bench trial, a trial court's misapprehension of evidence crucial to the defense violates the defendant's right to due process. *Mitchell*, 152 Ill. 2d at 321; *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1st Dist. 1976). Where the record does not affirmatively indicate that the fact-

finder was mistaken, there is a presumption that the trial court considered only competent evidence in reaching a verdict. *People v. Gilbert*, 68 Ill.2d 252, 258-59 (1977). In a bench trial, the trial court has the responsibility to both weigh the evidence and to make reasonable inferences from that evidence. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 52

¶ 18 Defendant argues that the trial court was mistaken in believing that Officer Haynie's testimony corroborated Officer Cranston's. The court mentioned Haynie's testimony three times. The court first stated that Haynie testified that he responded to 6905 South Elizabeth, which was consistent with where Cranston testified the defendant stopped. Later, the trial court stated that Haynie testified that he reached the address based upon the radio traffic that he heard "regarding Cranston and his partner following the vehicle." The trial court found that testimony "important." Finally, the court stated that Haynie testified that he knew to go to the address based upon the radio traffic and that suggested the officers had their lights and siren on.

¶ 19 Defendant points out that in fact Haynie's testimony indicated that he responded to a call at 6905 South Elizabeth. When asked what brought him to the address, Haynie responded that he was monitoring radio traffic. The State then asked "And you monitored radio traffic and you went to that location; correct?" Haynie responded yes.

¶ 20 Defendant argues that because the trial court stated that Haynie heard radio traffic regarding Cranston's pursuit, it must have misremembered Haynie's actual testimony where he makes no mention of Cranston or the pursuit. In our view, the trial court's comments suggest only that it found that Haynie's testimony corroborated Cranston's. Haynie testified that, based on "radio traffic" he responded to the address where defendant had been stopped; while Cranston testified that he informed dispatch that he was pursuing defendant. It was not unreasonable for

the trial court to infer that the radio traffic Haynie heard was either Cranston's transmission or a dispatcher's repetition of that information. Regardless of the trial court's conclusions regarding credibility based on that inference, we cannot find that the trial court affirmatively "misremembered" the testimony.

¶ 21 Defendant relies on *Bowie*, 36 Ill. App. 3d 177 (1976), *Mitchell*, 152 Ill. 2d 274 (1992), and *Williams*, 2013 IL App 111116. Each of those cases is distinguishable. In all three cases, the trial court's misapprehension was clearly and affirmatively indicated on the record. In *Bowie*, the trial judge stated during closing arguments that there had been no testimony that defendant was bleeding, yet the record showed that the defendant had testified to the bleeding on direct examination. *Bowie*, 36 Ill. App. 3d at 180. In *Mitchell*, the trial court stated that it did not recall the defendant testifying that he felt unable to leave a police interrogation during a suppression hearing. *Mitchell*, 152 Ill. 2d at 307. The record showed however that the defendant had testified that the police stated he could not leave. *Id.* at 306-07. In *Williams*, the judge stated that a defense expert had conceded it "certainly was defendant" when the witness had actually stated repeatedly that "certainty was not possible." *Williams*, 2013 IL App 111116, ¶ 85. In all three cases, there was no question that the trial court incorrectly recalled the evidence.

¶ 22 We find *Simon* to be more applicable to the present facts. *Simon*, 2011 IL App (1st) 091197. In *Simon*, a witness testified that he saw a victim approach the defendant, turned his back and then heard shots. *Id.*, ¶ 94. The *Simon* trial court stated that the witness testified he saw the victim approach "and thereafter the defendant got out and shot him several times." *Id.*, ¶ 90. The trial court also stated that the witness was "perhaps the most compelling" of the witnesses. *Id.*, ¶ 96. While the defendant argued on appeal that the trial court's statement incorrectly implied

that the witness had viewed the entire shooting, the *Simon* reviewing court noted that that was only one possible reading of the statement. *Id.*, ¶ 95. The *Simon* court noted that the statement could also be read as pairing testimony with the trial court's inference and found the lower court had not erred. *Id.* Similarly, in the present case there is no clearly evident misapprehension by the trial court.

¶ 23 Defendant also argues that the trial court erred because it found that Haynie's testimony suggested that Cranston and his partner were, in fact, using their lights and siren when they observed defendant violate the traffic control devices. We find that this argument does not constitute a challenge based on the trial court's failure to accurately recall the evidence. Rather this type of argument challenges the conclusions the trial court drew from properly remembered evidence. Defendant does not argue that the evidence was insufficient to support his conviction, leaving us with nothing further to review.

¶ 24 We find that defendant has failed to show that a clear and obvious error occurred, as the record does not affirmatively indicate a misapprehension of the evidence by the trial court. As in *Simon*, the trial court merely connected a witness's testimony with a reasonable inference drawn from the evidence. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.